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VOID, ILLEGAL OR UNENFORCEABLE CONSIDERATION.

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[The principle of severance where part of a contract is illegal and can be separated from the balance, is perhaps as "rock-ribbed and ancient" as any other principle of law. And indeed, since the case of *Skipwith v. Strother*, 3 Rand. 214, the principle has been well settled that where the transaction is of such a nature that the good consideration can be separated from the bad, the court will separate them and consider the contract valid so far as it is entirely distinct from and unaffected by the illegal consideration. But the conditions, limitations and restrictions upon this rule are many, and these are shown by no adjudication in Virginia. In fact the case just cited is really the only one in Virginia that has decided anything of importance with regard to this rule, and that case draws no distinction between promises that are *malum in se* and *malum in prohibitum*, which, as will be shown below is of vast importance. The ruling in *Matthews v. Traders Bank*, 2 Va. Dec. 539, deciding that this rule has no application to contracts based in part upon a usurious consideration, sheds no light on the question; it seems to be based entirely on the peculiar wording of section 2821 of the Code. For this reason, we regard the following article by Mr. W. P. Rogers, of the Cincinnati Law School, as very timely.]

The subject of consideration in contracts presents many interesting phases, but no questions connected with the subject are more interesting or more difficult of satisfactory solution than those arising where part of the consideration is void, illegal or unenforceable, the other part of the consideration being valid.

The distinction between void, illegal and unenforceable considerations must be noted, as the results where one is found may be entirely different from those produced by another.

It should also be remembered that the term "illegal" is not always used by the courts in the same sense, but is sometimes intended to stand for that which is simply void, sometimes for that which is only *malum prohibitum*, and again for that which is *malum in se*.

In the discussion of the questions growing out of this subject one naturally begins with *Pigot's Case*, 11 Coke Rep. 27b,

decided in 1615, where it was held that if some of the covenants of an indenture or of the conditions endorsed upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void *ab initio* and the others stand good.

This principle of law which comes down through the cases is no better stated in recent decisions than in *Windoe v. Webb*, 20 O. S. 435. The court there said that where for a legal consideration a party undertakes to do one or more acts and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established.

The same court, later quoting and approving this proposition, *Ohio ex rel. v. Board of Education*, 35 O. S. 519, points out the danger of inaccurate thinking along this line and the necessity of clearly distinguishing this rule from another closely related, but leading to a different result.

It is there said: "Care must be taken not to confound this rule with another equally well-settled, that where one of two considerations is illegal, and the other legal, the illegality of the one avoids the promise founded on both.

"In the former case there is one lawful and valuable consideration to support two promises, one legal, the other illegal, which are separable. In the latter case there are two considerations, one legal, the other illegal, to support one promise. The reason for this well-marked distinction is that, in the latter case, the promise being supported by two considerations, one lawful, the other unlawful, is an entirety based upon both, and cannot be apportioned, and it is against public policy to enforce a promise so supported. In such case, both considerations as a whole are the basis of the entire promise.

"Where, however, the whole consideration is lawful, and the promisor undertakes to do two things, one that is lawful and the other unlawful, and they are clearly distinguishable, the good consideration will support the lawful promise."

While the court's conclusion is correct it is assured that there must of necessity be two contracts of different kinds to illustrate the two rules under consideration.

This view is the basis for the somewhat inaccurate language in a portion of the opinion. If, for illustration, a single contract is taken, wherein A promises to do two or more distinct things, one of which is legal and the other illegal or void, in consideration of which promise B agrees to pay \$1,000, B, upon performing his promise, may waive the void or illegal promise of A and enforce A's valid promise, although both stand as the consideration for B's promise. On the other hand, A will not be able to enforce the contract against B, since the void or illegal as well as the legal portion formed a part of the consideration. He cannot make a valid tender of all he agreed to do and hence, cannot so place B in default as to have a right of action against him.

The courts are not clear concerning the nature or extent of the illegal promise, so combined with a legal promise, which may be waived by the other party to the contract, but it would seem that such illegal promise must not be *malum in se*, or of a criminal nature.

It was decided in *Gelpcke v. City of Dubuque*, 1 Wall. 221, Mr. Justice Swaine delivering the opinion, that where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal if there be no imputation of *malum in se*; and if the good part show cause of action, that it is error to sustain a demurrer to the whole. Referring to counsel's contention that certain provisions of the contract were invalid, he said: "Conceding this to be so, they are clearly separable and severable from the parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se* is, that the bad parts do not affect the good. The valid may be enforced." The same doctrine is stated in *United States v. Bradley*, 10 Peters, 366, and is supported by the citation of many authorities by Mr. Justice Story, who delivered the opinion in that case.

Among other things bearing upon the subject, he says: "That bonds and other deeds may, in many cases, be good in part and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well-founded in the common law and has been recognized from a very early period. * * *

The doctrine has been maintained and is settled law at the pres-

ent day in all cases where the different covenants are severable and independent of each other and do not import *malum in se*."

In the case of *The Erie Ry. Co. v. U. L. & E. Co.*, 35 N. J. L. 240, the question arose upon the provisions of a contract, part of which were legal and the other illegal. The defendants, common carriers, had bound themselves to give to plaintiffs the exclusive right to carry locomotives and tenders on trucks over plaintiff's road, and this provision was illegal and was connected with other provisions in the contract which were legal. Both the legal and the illegal provisions were supported by the same consideration moving from plaintiff.

The defendant refused to perform the contract or any part of it, and plaintiff sued for damages on account of the breach of the legal provisions. Defendant maintained that, since one of the provisions was illegal, the others were also void; but the court held that plaintiff could recover on the stipulations which were legal. The court said: "Admitting then for the purpose of the argument the illegality insisted upon, the legal problem plainly is this, whether, where a defendant has agreed to do two things which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. * * * An examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest."

The court then asserts that from the time of *Pigot's Case* to the present time the courts have universally admitted the doctrine, and many authorities are cited to sustain the proposition. *Chesman v. Nainby*, 2 Lord Raymond, 1456; 3 Bro. Parl. C. 349; *Mallan v. May*, 11 M. & W. 653; *Price v. Green*, 16 M. & W. 346; *Gaskell v. King*, 11 East, 165; *Nichols v. Stretton*, 10 Adol. & El. 346; *Chester v. Freedland*, Ley R. 19; *Sheerinan v. Thompson*, 14 Adol. & El. 1027.

The court further says, however, that the doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for the reason that such an ingredient will taint the entire contract and render it unenforceable in all its parts.

This reservation in the doctrine, which prevents its applica-

tion when there are provisions in a contract which are immoral or criminal or *malum in se*, strips it of many objectionable features, and avoids a conflict with another well-established rule of law, that where there are a number of considerations and any one of them is illegal, the whole agreement is avoided.

It is true that the two rules often seem in conflict, and it will be found that the courts have not always clearly distinguished between them. A few authorities may be found, even, holding that the plaintiffs, who made the legal and illegal promise, may sue upon the legal promise, where it has been performed, and the other party has failed to perform his part of the contract. *King v. King*, 63 O. S. 363; *Rosenbaum v. U. S. Credit System Co.*, 65 N. J. L. 255; 48 Atl. 235; *Fishel v. Gray*, 60 N. J. L. 5.

These authorities can only be sustained on the ground that the objectionable provisions in the contracts were not illegal, in the sense of being wicked or criminal, but simply void, and that, being so, defendant had no right to rely upon them, since they had no effect upon the contract.

In *Higgins et al. v. Gagar*, 47 S. W. 848, plaintiff made by parol a lease of a certain saloon to defendant for one year, and agreed not to sell cigars in his hotel for a period longer than one year. In consideration of these two promises defendant agreed to pay plaintiff \$55 per month for one year. The court held that while the parol lease for one year was valid, that plaintiff's promise not to sell cigars for a period longer than one year fell within that clause of the Statute of Frauds which prohibits any action upon any contract promise or agreement, that is not to be performed within one year from the making thereof, unless in writing. The court admitted that this part of its decision was in conflict with the decisions of other jurisdictions, citing *Doyle v. Dixon*, 97 Mass. 208. Holding that this portion of plaintiff's promise was unenforceable, it then concluded that plaintiff had no right of action against defendant who had refused to perform his part of the contract. Here plaintiff had made two promises, one to lease land to defendant, which was valid, the other to refrain from selling cigars, which the court said was not enforceable. Because of the ineffectiveness of the one plaintiff could not sue the defendant, who, in consideration thereof, had made one valid promise. Had the parties to this action been reversed,

the court would doubtless have held that he who made the single valid promise could have waived the unenforceable promise of the other party, and have sued upon that which was valid.

It is important to keep in mind the three classes of promises which have already been mentioned: promises which are *malum in se* or criminal; promises which are simply illegal and void (not criminal), and those which are neither illegal nor void but are only unenforceable.

Those of the first class, when connected with valid promises forming the consideration for a contract, make the whole contract void.

Those of the second class, when thus united with valid promises, may, when separable, be waived by the promisee and the valid enforced. But in this case he who has made both the legal and the illegal promise, cannot enforce the promise of the other party because he cannot make a valid offer to perform all his part of the contract. This is well illustrated by Pettit's Admr. *v.* Pettit's Distributees, 32 Ala. 288.

But those of the third class have no power or tendency to contaminate or to make void the valid agreements with which they are connected, and if they can be separated from them the latter will be readily enforced by him who made the simple valid promise.

The most frequent illustration of the rule will be found in those cases involving agreements in restraint of trade. *Dean v. Emerson*, 102 Mass. 480; *Smith's Appeal*, 113 Pa. St. 579; *Thomas v. Miles*, 3 O. S. 274; *Mallan v. May*, 11 M. & W. 262.

These cases also well illustrate both sides of the question.

In the case of *Bishop v. Palmer et al.*, 146 Mass. 469, plaintiff's action was for damages on account of defendant's breach of a contract wherein plaintiff had agreed for a certain amount to sell to defendant his business and had bound himself in the same contract not to enter or engage in said business anywhere for a period of five years. The court held that, as the latter provision of the contract was an agreement against public policy, plaintiff could not enforce the promise of defendant to buy, and had no right of action against him for a breach of the agreement; but conceded that if defendant had been willing to perform the contract and had sued plaintiff for its breach he might have re-

covered on that promise of plaintiff which was valid, waiving that which was invalid.

Mallan v. May, 11 M. & W., and *Green v. Price*, 13 M. & W., were cited to sustain this view. The former was a case concerning a contract between two physicians, wherein the defendant agreed not to practice his profession in London nor in certain other named towns. Defendant had broken the contract by practicing both in London and the other towns during the stipulated period. Plaintiff sought to recover damages for the breach of the contract.

Defendant contended that since the covenant not to practice in the other named towns was held to be invalid as a restraint of trade, although the agreement to practice in London was valid, the whole contract was void and neither promise could be enforced.

But the court held that the plaintiff had a good cause of action for defendant's breach of the valid stipulation.

The syllabus of *Green v. Price* gives accurately the point of the decision sustaining the same view and is as follows:

"By deed reciting that A and B had carried on business as perfumers in copartnership, and that it had been agreed between them that B, in consideration of 2,100 pounds, should assign to A his moiety of the good will, stock, etc., of the copartnership, B, in consideration thereof, covenanted that he would not at any time during his life carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same respectively; and for the observance of this covenant he bound himself in the sum of 5,000 pounds, by way of liquidated damages.

"Held—That this covenant was divisible and was good so far as it related to the cities of London and Westminster, though void as to the 600 miles; that a breach that defendant carried on the trade in the city of London was good; and that A was entitled to recover in respect to such breach the whole sum of 5,000 pounds."

The weight of authority sustains the foregoing doctrine, which seems to be sound and logical where plaintiff's portion of the contract is executed. If, however, one promise is illegal and void, though not *malum in se*, and is connected with another

promise which is good, there then arises the problem whether the promisee can enforce the valid promise if his part of the contract is unexecuted. In most of the decided cases where the promisee was permitted to enforce the valid promise, he had already performed his part of the agreement. But should the question be raised in an action on a bilateral executory contract, the plaintiff seeking to enforce the valid and waive the illegal promise, it would seem in such case that he would fail to establish a contract, because of lack of consideration to bind defendant.

In such a contract it seems clear that the promisee is not bound, and that he who has promised to do the two things, one of which is illegal, cannot compel the promisee to perform. It is well settled that if one party to a contract is not bound because of lack of consideration, neither is the other party bound. There must be mutuality of promises. *Keep v. Goodrich*, 12 Johns. N. Y. 397; *Buckingham v. Ludhern*, 40 N. J. 422.

Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. *Tucker v. Woods*, 12 Johns. 190; *Keep & Hale v. Goodrich*, 12 Johns. 397; *Lees v. Whitcomb*, 2 Mo. & P. 86.

The rule, then, which provides where there are two promises, one legal, the other illegal, for one valid consideration, that the promisee may enforce the legal promise, can only apply in those cases where the consideration is executed, and where, therefore, no question can arise as to a consideration for the promise sought to be enforced.

But it must be observed that this principle does not apply to promises which are unenforceable only because they fall within the Statute of Frauds. Such promises are not illegal, but form a perfect contract, including the element of consideration, and it is immaterial in the discussion of this question whether they are executed or executory. They are not even void unless the statute so provides, and even if they were, not being illegal, they would in no way taint or destroy valid promises with which they are joined. In *Rosenbaum v. U. S. Credit System Co.*, 65 N. J. L., 255, 48 Atl. Rep. 237, the court said:

"In most of the cases in which it has been held that if a promise forming part of the consideration of a contract is illegal,

the whole consideration is void, it will be found that to do the thing promised was illegal or immoral."

The court asserts that the only case to be found which holds that where one promise is merely void and not illegal, making other promises invalid, is *Bank v. King*, 44 N. Y. 187, and it is affirmed that the reasoning in that case is its own refutation. Other cases may be found wherein the doctrine is laid down that where one promise is void because it falls within the Statute of Frauds, other promises connected therewith thereby become void, though they would, if standing alone, be valid.

If the doctrine of *Pigot's Case* be sound, if a promise which is illegal and therefore void will not, when joined with a legal promise, prevent the enforcement of the latter, it is difficult to perceive the reason for holding that a promise which is perfectly good, but merely unenforceable because it falls within the Statute of Frauds, should prevent the enforcement of a distinct valid promise with which it is connected.

Yet it has been said that such a promise being void will invalidate others connected therewith. Thus in *Pond v. Sheehan*, 8 L. R. A. 414 (Ill.), the court concludes its opinion as follows:

"The contract * * * if void as to real estate must also be held void as to personal property."

Meyers v. Schemp, 67 Ill. 469, is cited to support this proposition.

Turning to the latter case it will be found that the same doctrine is there laid down and *Cook v. Tombs*, 2 Aust. 240, and *Lea v. Barber*, 2 Aust. 425, are cited as authority for the proposition.

These English cases to which this doctrine is traced were overruled in the later case of *Wood v. Benson*, decided in the Court of Exchequer in 1831, where the point was distinctly made that part of the promise fell within the Statute of Frauds and that therefore all was void. But the court held that a recovery could be had upon that promise which was not within the statute. *Bayley, B.*, said:

"I take it to be perfectly clear that an agreement may be void as to one part, and not of necessity void as to the other. It by no means follows that because you cannot sustain a contract in whole, you cannot sustain it in part."

In a number of cases where the actions were for specific per-

formance the rule is stated that where part of the agreements are void, all are void. This, of course, would be true in those actions brought to enforce specific performance of parol sales of land, with which were connected agreements to sell personal property. But in *Debeerski v. Paige*, 36 N. Y. 537, the court held that:

"If a part of an entire contract is void under the Statute of Frauds, the whole is void; a party will not be permitted to separate the parts of an entire agreement and recover on one part, the other being void."

An examination of this case will readily convince any one that it is not in accord with the well-established doctrines stated above, which are supported by both reason and authority. Of this case that which was said of *Bank v. King*, 44 N. Y. 187, applies:

"The reasoning in the case is its own refutation."

It is in conflict with the rule in Ohio which supports the early doctrine found in *Pigot's Case*. *Langer v. Werke*, 2 O. S. 519; *Thomas v. Adm. of Miles*, 3 O. S. 274; *Widoe v. Webb*, 20 O. S. 435; *Ohio ex rel. v. Board of Education*, 35 O. S. 519; *King v. King*, 63 O. S. 363.

Many recent cases establish a contrary doctrine which is now all but universal.

In *Rund et al. v. Mather*, 11 Cush, 1, where part of the promise fell within the Statute of Frauds and part did not, the court laid down this rule:

"If any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not either expressly or by necessary implication render the whole void; and provided further that the sound part can be separated from the unsound and be enforced without injustice to the defendant."

In *Henley v. Donovan*, 182 Mass. at page 68, the court says:

"Where the plaintiff has done work in consideration of the defendant's promising to do two things, the promise to do one being valid, the promise to do the other being within the Statute of Frauds, * * * the plaintiff can, if he chooses, forego all rights by reason of having been promised two things and enforce the performance of the one for which the promise is valid."

It is difficult to state any rule bearing upon this subject against which some authority may not be cited. But the following rules may be stated, being well supported by authority:

(a) Where two or more promises are made, part of which are legal and part illegal (not *malum in se*) in consideration of a legal promise, he who has made the legal promise may waive those promises which are illegal and enforce those which are legal, provided his part of the contract has been performed; but if his promise is also executory the contract being bilateral and being partly illegal cannot be enforced by either party thereto:

(b) But the contract cannot be enforced in any event by the party who made the illegal promise.

(c) If the illegal promise, so connected with a legal promise, is *malum in se*, or is a promise to perform a criminal act, the whole contract is void and unenforceable by either party thereto.

(d) But if the promise, so connected with a valid legal promise, is not illegal, but simply unenforceable, as one falling within the Statute of Frauds, it will not prevent the party who has made a legal promise on the other side, though it be executory, from waiving such unenforceable promise and enforcing the remaining promise.

W. P. ROGERS.

Cincinnati Law School.